BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2021-88-E

Dominion Energy South Carolina, Incorporated's 2021 Avoided Cost Proceeding Pursuant to S.C. Code Ann. Section 58-41-20(A)	))))))	**BRIEF OF INTERVENOR, PINE GATE RENEWABLES, LLC**

COMES NOW Intervenor, Pine Gate Renewables, LLC, ("PGR"), pursuant to the instructions of Commission Vice Chair Belser, on October 13, 2021, to file this Brief setting forth PGR's legal position in the above-captioned matter.

Introduction

The Commission heard days of technical testimony in this matter regarding the avoided cost filing made by Dominion Energy South Carolina ("DESC" or "the Company"). DESC's filing presents three issues for decision: (1) DESC's proposed avoided energy and capacity rates, (2) DESC's proposed changes to power purchase agreement and notice of commitment forms, and (3) the methodology used to develop DESC's proposed Variable Integration Charge ("VIC").

As explained below, the Energy Freedom Act ("EFA"), passed in 2019, sets forth clear legal standards applicable to each of these three issues. Those standards are mandated by statute, but also provide helpful guidance to this Commission as it navigates through thousands of pages of conflicting testimony.

As an overarching matter, the Energy Freedom Act directs that Commission decisions in Public Utilities Regulatory Policies Act ("PURPA") cases (**i**) be just and reasonable to ratepayers (**ii**) in the public interest (**iii**) consistent with PURPA, (**iv**) non-discriminatory to small power producers qualifying facilities ("QFs"), and (**v**) reduce the risk placed on the consuming public. S.C. Code § 58-41-20(A).

That broad standard, set forth in Section 20(A) of the EFA's PURPA provisions, is followed by Section 20(B), which speaks directly to three issue areas presented in this case. For each of the three issues, Section 20(B) requires that this Commission treat small power producers on a "fair and equal footing" with utility-owned resources, and directs the use of three specific standards to meet that objective. S.C. Code Ann. § 58-41-20(B).

First, avoided cost "rates" for the purchase of energy and capacity must "fully and accurately" reflect the utility's avoided costs. *Id.* § (B)(1).

Second, QF power purchase agreement terms and conditions must be "commercially reasonable" and consistent with federal standards. *Id.* (B)(2)

Third, an avoided cost "methodology" can only be approved if it "fairly accounts" for costs – including ancillary services – "avoided" or "incurred" by the utility, *id.* (B)(3).

This last standard applies to DESC's proposed VIC. However, the EFA also directs this Commission to consider, as a threshold matter, whether to "prohibit" *any* price reduction (charge) to QFs based on costs incurred, "…to respond to the intermittent nature…" of QF production. S.C. Code § 58-41-20(E)(3)(B). The statute also requires that electrical utilities offer "fixed price" power purchase agreements, with consideration given to longer terms to promote the "…state's policy of encouraging renewable energy." 58-41-20(F)(2).

Taken together, these standards guide the areas of inquiry before the Commission, starting with avoided cost rates paid to QFs, which must be as accurate as possible, but at a minimum must "fully" capture the utility's avoided costs. The evidence in this case, including testimony from the Commission's own consultant London Economics International ("LEI"), showed that DESC's proposed avoided cost rates do not accurately and fully compensate QFs for DESC's likely avoided energy and capacity costs. The Commission should adopt the corrected rates – incorporating more accurate gas price forecasting, a performance adjustment factor, and pricing periods – put forth by Witness Kenneth Sercy. [1]

Second, DESC's power purchase agreement ("PPA") and notice of commitment ("NOC") forms must be "commercially reasonable" and non-discriminatory. As a threshold matter, this Commission should reject DESC's position against the commercially reasonable standard in this case, just as this Commission did in 2019. Second, applying that standard, this Commission should accept most of the changes proposed by DESC, but should reject changes to the NOC form requiring pre-construction site control and proposed changes to form PPAs that increase insurance coverage amounts and surety bond requirements based on nothing more than parental corporate practice.[2]

Finally, as to the VIC, this Commission must first decide whether to prohibit any such charge, and then, if this Commission does not prohibit that charge, approve a charge only if it "fairly accounts" for incurred costs on a "fair and equal footing" with utility-owned generation and only if it results in a "fixed price" contract. DESC's VIC and the study said to support it fails these standards, just as they failed DESC in 2019. DESC's "Variable" Integration Charge must be rejected. If any charge is imposed, it must be fixed and treat QFs fairly and on equal footing with utility-owned resources.

The only defensible study of a proper integration charge in this Docket was conducted by CCEBA Witness, Ed Burgess, and his recommendations should be adopted. The proposed VIC and supporting study by Guidehouse are – as was the case in 2019 – seriously deficient. Both ORS and LEI recognized the Guidehouse study does not fully justify DESC's proposed VIC, even though neither ORS nor LEI conducted the full independent study or analysis that CCEBA Witness, Ed Burgess undertook. In contrast to DESC's proposed VIC values, which do not meet the statutory standard and could significantly inhibit QF development, the values proposed by CCEBA Witness, Ed Burgess – including a fixed integration charge of \$0.47/MWh for Tranche 1 and \$0.73/MWh for PPAs executed prior to the next avoided cost proceeding – accurately and fairly offset DESC's realistic integration costs and reduce risk to the consuming public while allowing some QF

[1] On this issue, PGR concurs with and adopts the summary of evidence and findings set forth in the proposed order filed by the Southern Alliance for Clean Energy and the Coastal Conservation League.

[2] On this issue and the VIC, as well as the important issue of the mitigation protocol, PGR concurs with and adopts the summary of evidence and findings set forth in the proposed order filed by the Carolinas Clean Energy Business Association ("CCEBA").

development to occur consistent with the explicit policy set forth in the EFA's PURPA provisions.

Background of The Energy Freedom Act

As this Commission well knows, the Energy Freedom Act is a wide-ranging law passed by the South Carolina General Assembly in the wake of the V.C. Summer debacle, which left South Carolinian ratepayers paying some $9 billion dollars for two nuclear units that South Carolina Electric and Gas ("SCE&G," now DESC) and the South Carolina Public Service Authority ("Santee Cooper") partially constructed and then abandoned before commercial operation.

The V.C. Summer failure was the single most expensive utility mistake in South Carolina history. In its wake, the General Assembly took a number of important actions to reform electric utility regulation in South Carolina to provide more utility oversight and accountability. Most saliently for this proceeding, in 2019 the Legislature unanimously enacted the Energy Freedom Act to increase regulatory scrutiny over the resource planning of investor-owned utilities including DESC and to encourage competitive clean energy, both utility-scale and distributed. As discussed below, a central feature of the EFA is Section 20, governing this Commission's proceedings under PURPA. Section 20 specifically directs the Commission to consider measures to "…promote the state's policy of encouraging renewable energy." S.C. Code Ann. § 58-41-20(F)(2).

In addition to the EFA, the General Assembly repealed the Baseload Review Act and restructured the Office of Regulatory Staff to strike that entity's statutory mission to protect the financial integrity of privately-owned monopoly utilities. In 2020, the General Assembly also created a commission to investigate the potential benefits to South Carolina ratepayers of joining a regional transmission organization that would allow market competition instead of vertically integrated monopoly generation. And in 2021, the General Assembly passed major legislation intended to increase accountability of Santee Cooper, restructuring the utility and placing major components under this Commission's regulatory jurisdiction.

The Public Utilities Regulatory Policies Act ("PURPA")

With the passage of PURPA in 1978 (codified at 16 U.S.C. §§ 796, 824a-3), Congress sought to encourage the development of alternative energy production facilities. In Section 210 of PURPA, Congress established a mandatory market mechanism whereby electric utilities are required to buy from qualifying small power production and cogeneration facilities ("Qualifying Facilities" or "QFs") at a price equal to that which the utility would otherwise pay to generate or purchase elsewhere. 16 U.S.C. § 824a-3(b). Congress instructed the Federal Energy Regulatory Commission ("FERC") to certify such facilities and establish rules to "encourage" small power production facilities and "require" them to "purchase energy from such facilities" using rates that must be "just and reasonable to the electric consumers of the electric utility and in the public interest" and which "shall not discriminate against [Qualifying Facilities]," with avoided energy rates not to cannot exceed "the incremental cost to the electric utility of alternative electric energy." *Id.*

The United States Supreme Court has reviewed and approved PURPA's framework on two separate occasions. In 1982, the Supreme Court examined the purpose of PURPA and found the statute to be a valid exercise of Congress' powers under the Commerce Clause given the intended benefits that would accrue to public health, safety, welfare, and national security. *FERC v. Mississippi*, 456 U.S. 742, 756–58 (1982). Then, in *American Paper Inst. v. Am. Elec. Power Serv. Corp.*, the Supreme Court rejected challenges to FERC's Avoided Cost Rule over objections that it failed to guarantee savings for ratepayers because, according to the Court, FERC properly "…deemed it more important that the rule could provide *a* significant incentive for a higher growth rate of cogeneration and small power production…." 461 U.S. 402, 415 (1983) (internal citation omitted).

Similarly, the use of forecasts to set PURPA rates was upheld over objections of imprecision compared to actual avoided costs because, among other things, FERC had properly balanced the need for a "secure revenue stream" to sustain QF development. *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 858 n.8 (9th Cir. 1994). As FERC explained to the Supreme Court in *American Paper*, "[t]he monopsony power of electric utilities was a primary reason for the enactment of Section 210 of PURPA" and "it is precisely the utility's economic ability successfully to refuse to purchase a qualifying facility's output or to pay 'an appropriate rate' that demonstrates its monopsony power." Brief for the Federal Energy Regulatory Commission, American Paper, 1982 WL 1044706 at *13-14 (1982).

The Energy Freedom Act and PURPA

As noted above, a central feature of the Energy Freedom Act is Section 20, which for the first time sets forth detailed provisions governing this Commission's implementation PURPA. While this Commission had been implementing PURPA for decades since that federal statute's enactment, the General Assembly saw fit to enact thousands of words of new law governing avoided cost proceedings. Among other things, the law separates each investor-owned utility's PURPA proceedings from its annual fuel rider dockets – which had left the Commission and parties little time to investigate the utilities' avoided cost filings – and empowers the Commission to engage an independent third-party consultant to assist in resolving these important, but highly complex, proceedings.

Along with evident intent to require greater scrutiny of utility avoided cost filings, the General Assembly also made clear that it understood PURPA to be an important avenue for bringing renewable power into investor-owned monopoly service territories. The EFA's PURPA provisions require that this Commission treat qualifying facilities in a fair and non-discriminatory manner, consider prohibiting charges on QFs for utility integration costs, and review PURPA contract length to "…promote the state's policy of encouraging renewable energy." S.C. Code Ann. § 58-41-20(F)(2).

The General Assembly's intent fits with the overall purpose of PURPA, recited above, to "encourage" small power production facilities and "require" utilities to "purchase energy from such facilities" at rates that equal the utility's incremental energy costs, are "just and reasonable" to consumers and "in the public interest," and that electrical utilities "…shall not discriminate against…" Qualifying Facilities. 16 U.S.C. § 824a-3(b).

The Avoided Cost Provisions Applicable to this Proceeding

Section 20(A) of the EFA sets forth a number of factors that must be considered in any decisions regarding PURPA and QFs. Section 58-41-20(A) directs that this Commission open PURPA dockets for the various utilities and render decisions that are: "just and reasonable to ratepayers," "in the public interest," "consistent with PURPA and FERC's implementing regulations and orders," "non-discriminatory to small power producers (QFs)," and which must "…strive to reduce the risk placed on the using and consuming public."

Some of these factors are self-evident or reference long-standing ratemaking principles ("just and reasonable"). Others, however, beg interpretation and reference to the Energy Freedom Act more broadly. As to the "public interest," for example, the General Assembly elsewhere in the EFA's PURPA provisions "expressly directed" this Commission in reviewing QF contract lengths to consider the "potential benefit" of longer terms to "…promote the state's policy of encouraging renewable energy." 58-41-20(F)(2). Thus, the state's public policy, expressly set out in the EFA's PURPA provisions, is to encourage renewable energy, and that must be considered as part of the public interest.

Similarly, the requirement that decisions be "non-discriminatory" to QFs requires an understanding of what discrimination against QFs looks like. Section 58-41-20(B) fills that in by requiring that QFs be treated "on a fair and equal footing" with utility-owned resources. Thus, where a utility does not charge shareholders to pay for costs incurred integrating its own generation resources, then such charges cannot be passed along to QFs. The General Assembly's heightened concern for such discrimination is underscored by EFA Section 20(E)(3)(B), which directs this Commission to consider whether to "prohibit" PPA terms "reducing the price paid" to QFs due to the utility's claimed costs of integrating intermittent QF power.

While Section 20(A) sets out various factors for this Commission to optimize, the very next section, Section 20(B), establishes more specific requirements for this Commission in evaluating avoided cost rates, contract terms, and methodologies used to determine the VIC. At a minimum, Section 20(B) requires that in implementing the statute's PURPA provisions the Commission "shall treat small power producers on a *fair and equal footing*;" and sets forth three subsections to achieve that result for (1) avoided cost rates, (2) agreement terms and conditions, and (3) methodologies for determining avoided and incurred costs.

<u>First</u>, as to "rates" for the purchase of "energy and capacity" Section 20(B)(1) requires that such rates "fully and accurately" reflect the utility's avoided costs. By explicitly requiring that such rates not just accurately reflect a utility's avoided costs, but also "fully" do so, this requirement fits with Section 20(B)'s overriding directive that small power producers be treated "on a fair and equal footing" with utility-owned resources. If is there is a band of uncertainty or dispute around a utility's calculated avoid costs, for example, that uncertainty must be resolved so as to ensure that any and all avoided costs are "fully" compensated to QFs. The term "fully" must be given the independent meaning it

was clearly intended to have: South Carolina caselaw requires that all terms used in a statute be given meaning and not be rendered superfluous. *See In re Decker*, 322 S.C. 215, 471 S.E.2d 462 (1995) (a statute should be construed so that no word, clause, provision, or part is rendered superfluous).

Second, as to QF power purchase agreements, Section 20(B)(2) requires that terms and conditions be "commercially reasonable" and consistent with federal standards. Again, this fits with 58-41-20(B)'s controlling directive that small power producers be treated "on a fair and equal footing" with utility-owned resources. Commercially unreasonable terms would not treat QFs on a fair and equal footing. And while DESC has argued that this Commission cannot apply a "commercially reasonable" standard, the statute could not be clearer in requiring that this very standard be applied in reviewing the terms and conditions of DESC's proposed PPAs and NOC forms.

Third, Section 20 (B)(3) addresses the broader issue of "methodology." Specifically, it requires that the utility's avoided cost "methodology fairly accounts" for costs "avoided" or "incurred" by the utility, "including, but not limited to energy, capacity, and ancillary services provided by or consumed by small power producers." S.C. Code § 58-41-20(B)3). Like subsections 1 and 2, subsection 3 is in service of Section 20(B)'s overarching requirement that small power producers be treated "on a fair and equal footing" with utility-owned resources, which it does by requiring that a methodology "fairly account" for costs avoided or incurred, including ancillary services.

Subsection 3 is the provision is applicable to the VIC, which, as this Commission heard, concerns DESC's claimed future costs of integrating intermittent solar resources. Because a VIC must "fairly" account for costs avoided and incurred, and do so in a way that treats small power producers "on a fair and equal footing" with utility-owned resources, a charge that singles out QFs and treats them on unfair and unequal footing with utility's owned resources cannot be approved. This means that DESC, to have its VIC approved, must show that the costs for integrating its own resources (e.g., building turbines to provide back-up power for nuclear units, for example, or the costs of curtailing gas generation due to minimum nuclear unit operating levels) are charged to DESC shareholders rather than to ratepayers. If, as here, a utility has *not* shown that it treats its own resources in like manner, an integration charge cannot be imposed on fair and equal footing.

The General Assembly's high degree of concern about utility discrimination against clean energy QFs is confirmed in Section 20(E)(3)(B), which directs this Commission to consider whether PPAs should "prohibit" outright any terms "reducing the price paid" to QFs based on costs incurred by the utility "to respond to the intermittent nature" of QF production. S.C. Code 58-41-20(E)(3)(B). By directing this Commission to consider *whether* to prohibit such charges, the General Assembly clearly empowered this Commission to prohibit or reduce them in its review of utility proposals.

Finally, as relevant to the VIC, the statute requires that whatever charges are imposed, cannot be variable. The utility must offer a "fixed price" contract. S.C. Code Ann. § Section 20(F)(2). A contract that includes a variable integration charge subject to modification based on future analysis and proceedings is not a "fixed price" contract and and is thus impermissible under the statute.

Considered together, the Energy Freedom Act provisions governing the VIC empower this Commission to disallow DESC from charging any VIC at all. Indeed that is the required outcome where: a utility fails to prove that it has incurred actual integration costs, fails to show that it its own shareholders pay similar charges for utility-owned generation; and seeks to impose a charge that is variable, not fixed.

Application of Legal Standard to Facts

The standards set forth in the Energy Freedom Act lead to the following conclusions on the three main issues this case presents for decision.

First, because avoided cost rates paid to QFs must be as accurate as possible but must "fully" capture the utility's avoided costs, DESC's proposed avoided cost rates cannot be approved. The Commission should adopt the corrected rates – including more accurate gas price forecasting, a performance adjustment factor, and pricing periods – put forth by Witness Kenneth Sercy.

Second, the Commission should reject certain DESC proposed changes to its form PPA and NOC forms because DESC has not shown those changes to be needed or "commercially reasonable." Specifically, this Commission should reject changes to the NOC form requiring unreasonable requirements for pre-construction site control and changes to form PPAs that increase insurance coverage amounts and surety bond requirements based on nothing more than parental corporate practice.

Finally, DESC's "Variable" Integration Charge must be rejected. As was the case in 2019, DESC's VIC and supporting study by Guidehouse are seriously deficient, as recognized by both ORS and LEI even though neither conducted a full independent study or analysis. DESC has not shown that its charge "fairly accounts" for costs incurred or treats QFs on fair and equal footing with DESC-owned resources, and indeed it has not shown that such a charge should not be prohibited. Further, DESC's proposed variable charge does not honor the goals of the EFA's PURPA provisions to encourage more renewable resources and its admonitions that QFs must be treated in a non-discriminatory manner. S.C. Code § 58-41-20(A).

While the Guidehouse study was widely recognized as not fully justifying the VIC, extensive sworn testimony from CCEBA Witness, Ed Burgess, who reviewed the Guidehouse study in great detail – despite its shifting rationale – produced specific recommendations to improve the study so that it more accurately and fairly captures whatever integration costs Dominion may have. CCEBA Witness, Ed Burgess' recommendations – including fixed integration charges of $0.47/MWh and $0.73/MWh – accurately and fairly address DESC's realistic integration costs and reduces risk to the consuming public while allowing some QF development to occur consistent with the explicit policy set forth in the Energy Freedom Act's PURPA provisions.

This Commission should undertake a full independent study of integration costs going forward as contemplated by the statute, but the ongoing absence of that study is no basis for adopting variable, rather than fixed, rates – which the law requires. The study conducted by Guidehouse does not support a fixed or variable charge of $1.80 (and more) as proposed by DESC and the Commission should adopt fixed charges of $0.47/MWh and $0.73 as justified in the record until an independent integration cost study is completed.

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Respectfully Submitted,

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November 3, 2021